Filed 12/2/08 P. v. Bergeron CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN DOMINICK BERGERON, Defendant and Appellant.	G039414 (Super. Ct. No. 04WF1694) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed as modified.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

John Dominick Bergeron appeals from a judgment after the trial court found true he suffered a foreign prior strike conviction and sentenced him to 135 years to life in state prison. Bergeron argues double jeopardy principles prohibited retrial of his prior conviction, the trial court erroneously admitted evidence, insufficient evidence supports the court's finding he suffered the prior conviction, the court erroneously refused to strike one or both of his prior convictions, and the abstract of judgment must be corrected to reflect the award of additional days of actual credit. With the exception of his abstract of judgment claim, his contentions have no merit, and we affirm the judgment as modified.

FACTS

In our prior nonpublished opinion, *People v. Bergeron* (Feb. 28, 2007, G036254), we affirmed Bergeron's convictions for numerous offenses arising out of a crime spree committed from March 2004 to June 2004, and reversed the finding his prior Nevada conviction for robbery qualified as a serious felony offense in California because of insufficient evidence. We remanded the matter for further proceedings consistent with our opinion.

After the trial court reinstituted proceedings, the prosecutor moved to admit additional evidence, an amended information, at the sentencing hearing. Bergeron opposed the motion arguing the prior Nevada conviction was not a strike because the Nevada robbery statute does not include all the elements of the California robbery statute, and there was insufficient evidence. He also filed a motion stating his intent to enter a "once in jeopardy plea" and a motion requesting the trial court exercise its discretion and strike any remaining priors at resentencing pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

At the trial on Bergeron's prior convictions, the prosecutor offered exhibit Nos. 19, 20, 21, and 22, the same exhibits admitted into evidence in his first trial, to prove his prior convictions. Because of a logistical issue, the matter was trailed to the following week. When the matter resumed, the trial court granted the prosecutor's motion to present additional evidence, and denied Bergeron's "once in jeopardy plea." The prosecutor offered exhibit No. 23 for identification, and moved that all the exhibits be admitted into evidence. Bergeron objected to admission of exhibit No. 23 on relevancy and hearsay grounds. The court overruled the objection and admitted all the exhibits into evidence.

The trial court found beyond a reasonable doubt that Bergeron suffered a Nevada robbery conviction within the meaning of Penal Code section 667.[1] The court denied Bergeron's request to strike one of his prior strike convictions. As it did at his first sentencing hearing, the court sentenced Bergeron to state prison for a total term of 135 years to life.

DISCUSSION

I. Federal and State Double Jeopardy

Bergeron argues the trial court erroneously denied his "once in jeopardy plea." We disagree.

In *Monge v. California* (1998) 524 U.S. 721 (*Monge II*), the United States Supreme Court agreed with the California Supreme Court in *People v. Monge* (1997) 16 Cal.4th 826 (*Monge I*), and ruled the double jeopardy clause does not preclude a retrial on a prior conviction allegation in the noncapital sentencing context.

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 468-469, the United States Supreme Court examined the constitutionality of a New Jersey hate crime statute that provided for an extended term of imprisonment if the trial judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating a group or individual "'because of race, color, gender, handicap, religion, sexual orientation[,] or ethnicity.'" The Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

Bergeron acknowledges that pursuant to the *Monge* cases, retrial of the truth of his prior Nevada robbery conviction was permissible. However, he asserts that in light of *Apprendi*, *Monge II* is not controlling because "the bare elements of a Nevada robbery do not include all the necessary elements for a California robbery . . . [and] there was a factual finding necessary in order to sustain the prosecutor's allegation." We agree there was a factual finding necessary to prove Bergeron suffered the prior Nevada robbery conviction. But that is not what Bergeron argued below, or on appeal. His argument is that in light of *Apprendi*, double jeopardy principles preclude him from being retried. With this we do not agree.

"Clearly, a plain reading of *Apprendi* refutes [petitioner's] conclusion that *Apprendi* 'superseded' the *Monge* decisions and therefore the bar of double jeopardy precludes retrial of a prior serious felony allegation. We therefore conclude that the *Monge* decisions remain extant and that they govern. Accordingly, retrial of the nature of [petitioner's] assault prior conviction is not barred by double jeopardy. [¶] Until our Supreme Court decides otherwise, we are bound to follow *Monge [I]*, and therefore, we are not at liberty to find that a retrial in this matter is barred by the principles of double jeopardy. [Citation.]" (*Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1303; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 813-816 (*Jenkins*).)

The California Supreme Court cases Bergeron relies on do not undermine *Monge I*. (*People v. Seel* (2004) 34 Cal.4th 535; *People v. Sengpadychith* (2001) 26 Cal.4th 316.) Additionally, the *Jenkins* court's statement "*Apprendi* may indeed require a jury determination of factual issues" relating to foreign convictions does not mean Bergeron may not be retried on the prior conviction. (*Jenkins, supra*, 140 Cal.App.4th at p. 816.) It only means he may have the right to a jury trial on factual issues concerning foreign convictions. Finally, *U.S. v. Blanton* (9th Cir. 2007) 476 F.3d 767, is of no help to Bergeron as it did not explain how *Apprendi* distinguished *Monge II* as being a different kind of case, and it did not acknowledge that *Apprendi* preserved the recidivism exception as part of its holding.

II. Exhibit No. 23[2]

Bergeron contends the trial court erroneously admitted exhibit No. 23 because it was irrelevant and hearsay. Again, we disagree.

"Where . . . the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.] This rule applies equally to California convictions and to those from foreign jurisdictions. [Citations.]" (*People v. Miles* (2008) 43 Cal.4th 1074, 1082 (*Miles*).)

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[2] The table of contents in the clerk's transcript indicates the prosecutor's exhibit Nos. 19 through 23 are included. However, the clerk's transcript does not include a face page for exhibit No. 23. It includes a face page for exhibit No. 22, but the description of exhibit No. 22 in the minute order indicates exhibit No. 22 includes documents from Bergeron's Kansas conviction. Exhibit No. 22 in the clerk's transcript includes Kansas records, but before those records, it also includes the information *and* amended information for his Nevada conviction, and the Nevada judgment of conviction (plea). Neither party disputes the information and amended information included in the clerk's transcript at pages 156 through 158 are the documents comprising exhibit No. 23.

A. Relevancy

Bergeron claims the amended information was not relevant because the prosecutor failed to offer "other evidence, such as a plea transcript or other clerical record that indicated [he] pleaded guilty to the charge as alleged in the information or amended information." Not so.

Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although "'there is no universal test of relevancy, the general rule in criminal cases [is] whether or not the evidence tends logically, naturally, and by reasonable inference to establish any [material] fact . . . .'" (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

Here, the amended information was relevant because it tended to prove a disputed fact—whether Bergeron suffered a prior Nevada robbery conviction. The amended information in case No. C103363 charged Bergeron with robbery in violation of Nevada Revised Statute section 200.380. The amended information alleged that on December 6, 1990, Bergeron "willfully, unlawfully, and feloniously [took] personal property, to-wit: wallet and contents, including lawful money of the United States, from the person of MARK FRY, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said MARK FRY." The judgment of conviction (plea) indicates that in case No. C103363, Bergeron pleaded guilty to the crime of robbery in violation of Nevada Revised Statute section 200.380 committed on December 6, 1990.[3]

[3] The judgment of conviction (plea) form indicates Bergeron pled guilty the same day the amended information was filed, presumably as part of a plea agreement as the original information charged him with robbery with use of a deadly weapon in violation of Nevada Revised Statute sections 200.380 and 193.165.

The amended information logically, naturally, and by reasonable inference tended to establish Bergeron suffered a prior Nevada robbery conviction. Therefore, the amended information was relevant. (*Miles, supra,* 43 Cal.4th at p. 1082 ["A court document, prepared contemporaneously with the conviction, as part of the record thereof, by a public officer charged with that duty, and describing the nature of the prior conviction for official purposes, is relevant and admissible on this issue"].)

Bergeron's real complaint is the amended information and the judgment of conviction (plea) were insufficient evidence to support the trial court's finding his prior Nevada robbery conviction was a strike because he pleaded guilty to violating Nevada Revised Statute section 200.380, but he did not admit to the factual allegations included in the amended information. We will discuss his sufficiency of the evidence claim anon.

B. Hearsay

Bergeron also claims the amended information was inadmissible hearsay. This contention has no merit. "Hearsay, of course, is evidence of an out-of-court statement offered by its proponent to prove what it states. [Citation.] Unless it comes within an exception, it is inadmissible. [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 185; Evid. Code, § 1200.) The entire record of conviction, "includ[ing] certified documents from the record of the prior proceeding and commitment to prison[,]" is admissible and falls within the hearsay exception for contemporaneous official records codified in Evidence Code section 1280. (*Miles, supra,* 43 Cal.4th at p. 1082.) Thus, the amended information was admissible pursuant to Evidence Code section 1280.[4] Again,

[4] Evidence Code section 1280 states: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Bergeron's claim the language in the amended information was insufficient evidence to prove his prior Nevada conviction was a strike in California will be addressed next.

III. Sufficiency of the Evidence

Bergeron argues insufficient evidence supports the trial court's finding his prior Nevada robbery conviction was a prior serious felony in California pursuant to section 667. Again, we disagree.

"A conviction in another jurisdiction qualifies as a strike if it contains all of the elements required for a crime to be deemed a serious or violent felony in this state. (§ 667, subd. (d)(2) . . . .) A conviction qualifies for the five-year enhancement under section 667, subdivision (a)(1)[,] if it includes all the elements of a serious felony." (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128.)

"The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. [Citation.] Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. [Citations.] This rule applies equally to California convictions and to those from foreign jurisdictions. [Citations.] [¶] . . . [¶] However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred. [¶] On the other hand, the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record, and describing the prior conviction, is truthful and accurate. Unless rebutted,

such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citations.] [¶] On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citations.]" (*Miles, supra,* 43 Cal.4th at pp. 1082-1083.)

Nevada Revised Statute section 200.380 provides: "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: [¶] (a) Obtain or retain possession of the property; [¶] (b) Prevent or overcome resistance to the taking; or [¶] (c) Facilitate escape. [¶] The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear."

In California, "Robbery is defined as the taking of personal property of some value, however slight, from a person or the person's immediate presence by means of force or fear, with the intent to permanently deprive the person of the property. (§ 211 . . . .)" (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

The Nevada and California robbery statutes differ in two respects. "[U]nder Nevada law, robbery requires only *general* criminal intent [citations], whereas under California law, robbery requires a *specific* criminal intent to permanently deprive another person of property [citation]." Also, "under Nevada law, a taking accomplished

by fear of *future* injury to the person or property of *anyone in the company of the victim at the time of the offense* qualifies as robbery [citation]," whereas in California the taking by force or violence must be immediate. (*People v. McGee* (2006) 38 Cal.4th 682, 688.)

Bergeron relies on these differences to argue insufficient evidence supports the conclusion his prior Nevada robbery conviction was a prior serious felony within the meaning of section 667. He claims that without other evidence establishing he admitted to the facts alleged in the amended information, the amended information and the judgment of conviction (plea), were insufficient evidence to establish his prior Nevada robbery conviction was a strike because his guilty plea admits only the elements of the charged crime, and nothing more. Bergeron forgets the trial court may draw reasonable inferences from the entire record of conviction.

As we explain above, based on the fact the amended information and the judgment of conviction (plea) had the same case number, date of the offense, and applicable Nevada statute, Bergeron pled guilty to violating Nevada Revised Statute section 200.380, and therefore, there was sufficient evidence all the elements of that offense were established.

The amended information alleged that on December 6, 1990, Bergeron "willfully, unlawfully, and feloniously [took] personal property, to-wit: wallet and contents, including lawful money of the United States, from the person of MARK FRY, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said MARK FRY." Based on the amended information, the trial court could reasonably infer Bergeron took the victim's wallet and money through immediate force, violence, or fear of injury to the victim and with the specific intent to permanently deprive the victim of that property.

As to the requirement the immediate taking be through force or fear, the amended information alleges Bergeron took the wallet and money from the victim "by

means of force or violence, or fear of injury to, and without the consent and against the will" of the victim. Based on this language in the amended information, the trial court could reasonably infer the unlawful taking was immediate. With respect to the specific intent requirement, as Bergeron himself concedes, "[w]hile[] it may be highly unlikely that [he] was acting with the intent to only temporarily deprive the owner of" his wallet and money, it was possible. Or in other words, based on the amended information, the trial court could reasonably infer Bergeron took the victim's wallet with the specific intent to permanently deprive the owner of his wallet and money. Contrary to Bergeron's assertion, these were reasonable inferences, and not mere speculation. Therefore, there was sufficient evidence to support the trial court's finding Bergeron's prior Nevada robbery conviction was a prior serious felony in California pursuant to section 667.

IV. Romero

Bergeron claims the trial court abused its discretion in denying his *Romero* motion based on changed circumstances since he was imprisoned. Not so.

When ruling whether to vacate a prior serious felony conviction finding under the "Three Strikes" law pursuant to section 1385, subdivision (a), "the court in question must consider whether, in light of the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious . . . felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Dismissal of a strike under section 1385 is a departure from the sentencing norm. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) The trial court's ultimate conclusion is evaluated under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "'Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling,

even if we might have ruled differently in the first instance' [citation]." (*Id.* at p. 378.)

In his supplemental *Romero* motion supported by documentary evidence, Bergeron requested the trial court strike his prior conviction based on changed circumstances. Bergeron asserted he had studied the Bible, he was a model prisoner, and he had been diagnosed with HIV. He stated striking his prior convictions would allow him to be reclassified for housing and allow him to minister to others and see his family.

At the sentencing hearing, the trial court stated it reviewed the original and supplemental sentencing reports, and Bergeron's original *Romero* motion and a supplement to that report, including academic transcripts, certificates, and letters from Bible schools and prison review documents attesting to his good behavior. In ruling on the *Romero* motion, the trial court explained: "I've given this a good deal of consideration. There's no question that in relation to the supplemental information that [Bergeron] has done well since he was last before this court by way of sentencing . . . . [¶] But [Bergeron's] life has been one of up and downs and he had accomplished a great deal in his association with the Delancy [*sic*] Street program also which is before these crimes that are before this court. And this was a course of conduct over a two-month period there in 2004 and the common strain in relation to violent conduct was all against basically young women. [¶] And I have given this a lot of thought. . . . Bergeron has shown that he is an asset to [the] Department of Corrections in terms of his conduct and his interaction with other people, but the court considering its responsibilities cannot in good judgment strike the priors."

We disagree with Bergeron's claim the trial court failed to consider the nature and circumstances of the case and "the . . . court acted under a 'responsibility' to impose the same sentence as previously selected, ignoring the reality of how long [he] could be expected to live in view of [his] serious health issues." The court twice stated it considered the matter thoroughly and felt Bergeron did not fall outside the scheme's spirit. The court provided a coherent and thoughtful basis for reimposing the same

sentence and took into account the specifics of his previous accomplishments followed by his backsliding. Based on the court's thoughtful consideration of the nature and circumstances of the offense and Bergeron's rehabilitation, we conclude the court properly refused to strike one or both of Bergeron's prior convictions.

V. Abstract of Judgment

Bergeron claims the abstract of judgment must be amended to include presentence credits the trial court awarded at resentencing, but that do not appear on the abstract of judgment. We agree.

Section 2900.1 states: "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid or which is modified during the term of imprisonment, such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts."

At the sentencing hearing, the trial court awarded Bergeron an additional 711 days of actual credit. On the abstract of judgment where it allows for the clerk to enter "other orders," the clerk noted the court awarded Bergeron "an additional actual credit of 711 days[.]" But the clerk did not include the additional 711 days actual credit in section 13 where the award of credits is noted. We correct the abstract of judgment to include an additional 711 days of actual credit. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-187 [A reviewing court may correct an error in the abstract of judgment on its own motion or upon the request of the parties].) The abstract of judgment should reflect Bergeron was awarded 75 days of local conduct credit plus 1213 days of actual credit for a total of 1288 days credit.[5]

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[5] Bergeron claims the total number of days credited should be 1,279, but we calculate the total number of credits to be 1,288. The Attorney General did not respond to this claim.

DISPOSITION

The judgment is affirmed as modified. The clerk of the superior court is ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.